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No. 589

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In The

SUPREME COURT OF THE UNITED STATES

October Term, A.D. 1963

LEE DANFELSER and BYRDIS DANFELSER,

Petitioners,

vs.

STATE OF NEW MEXICO, ex rel STATE HIGHWAY COMMISSION OF NEW MEXICO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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OPINIONS BELOW

The opinion of the Supreme Court of the State of New Mexico, filed December 14, 1962, appearing in Volume 133, Lawyers Opinion Service but otherwise unreported and later withdrawn.

The revised opinion of the Supreme Court of the State of New Mexico, filed August 5, 1963, reported in 384 P. 2d 241, State Report not yet issued (Appendix to Petition pages 11-34).

JURISDICTION

The revised decision of the Supreme Court of the State of New Mexico was filed August 5, 1963; Petition for Writ of Certiorari was filed in the Supreme Court of the United States on October 28, 1963. Petitioners evidently intend to invoke the certiorari jurisdiction of this Court under 28 U.S.C., § 1257(3).

QUESTIONS PRESENTED

Whether or not the refusal of the Supreme Court of New Mexico to recognize liability in this case denrived Petitioners of their property without just compensation.

Whether or not the refusal to allow compensation to Petitioners denies them due process or equal protection of the laws.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

New Mexico Constitution, Article II, Section 20.

U.S. Constitution, Amendment V and Amendment XIV.

(Misquoted--should read "within its jurisdiction" rather than "within that jurisdiction").

Section 55-10-5, N.M.S.A., 1953 Compilation (Volume 8, Part 2).

23 U.S.C.A., Section 107.

The pertinent provisions are set forth in the Appendix to the Petition, pages 35-36.

STATEMENT

This action was commenced by Respondent in the District Court of Bernalillo County, New Mexico, to acquire a portion of Petitioners' unimproved property needed for construction of a controlled access highway and to determine the amount of compensation to be paid Petitioners.

The strip of property taken was to be used for construction of a two-way frontage road which would serve as one means of access to Petitioners' land in place of Petitioners' former access to the eastbound lanes of the original divided highway. The original divided highway was rebuilt to function as an entrance ramp to the controlled access highway. Interchanging of traffic between the frontage road and the parallel entrance ramp was prohibited by means of a fence although there were points both east and west of Petitioners' property where such interchange movements could be accomplished and would permit entrance to or exit from the controlled access highway.

The facts are uncontested and were presented to the trial court by stipulation. The amounts of all damages were stipulated and all damages were paid in the amount of $34,917.00 prior to appeal except for those damages involved in the access question.

No state or federal constitutional question was raised in the District Court, nor did the District Court make any rulings thereon. The District Court ruled in favor of Petitioners and Respondent appealed. The Supreme Court of New Mexico reversed, holding that there was no unreasonable interference with Petitioners' access and therefore there was no compensable loss or damage to access, and that such a holding was not violative of any provisions of the State's or the United States' Constitutions.

No state or federal constitutional question was raised on appeal until Petitioners moved for rehearing and at which time Petitioners and amici curiae raised similar constitutional questions.

Two other cases were pending in the Supreme Court of New Mexico at the same time involving related questions, and these decisions are enlightening in analyzing the decision in this case. These decisions are:

State Highway Commission v. Silva
71 N.M. 350, 378 P. 2d 595.

State Highway Commission v. Lavasek
385 P. 2d 361; (State report not yet published.)

ARGUMENT

POINT I

The judgment does not violate the "due process", "just compensation", or "equal protection of the laws" provisions of the Constitutions of New Mexico or the United States.

Petitioners contend that the failure of the Supreme Court of New Mexico to recognize liability for the alleged taking or damaging of access constitutes a violation of the constitutional provisions relating to "due process", "just compensation", and "equal protection of the laws".

The judicial determination of compensability or the extent thereof does not create any question under the constitutional provisions. The question of whether an injury is damnum absque injuria or the question of the amount of compensation which is to be paid to an owner by reason of an act of eminent domain is a judicial question. (Chicago, B. & Q. Co. v. Chicago, 166 U.S. 226, 246, [1897]; McCoy v. Union Elevated R.R. Co., 247 U.S. 354, 363 [1918]).

This Court has held that as long as compensation is made or provided for, the determination of the amount of the compensation does not present a substantial Federal question under the due process provision of the Fourteenth Amendment. (Appleby v. Buffalo, 221 U.S. 524, 531-533 [1911], affirming 189 N.Y. 163, 81 N.E. 954 [1907]). In the cited case the New York Court of Appeals had held in a condemnation proceeding that the condemnee was entitled to only nominal damages.

In Provo Bench Canal Co. v. Tanner, 239 U.S. 323 [1915], affirming 40 Utah 105, 121 P. 584 [1911], this Court held that in eminent domain proceedings an award of one dollar for property taken for an easement does not deprive the owner of his property without due process of law if the state court recognized the right to recover for any substantial damage, but found as a matter of fact that no damage whatever had been shown.

Dispositive of the claim of alleged deprivation of due process is McGovern v. City of New York, 229 U.S. 363, 370-371 [1913], affirming 195 N.Y. 573, 88 N.E. 1132 [1909], which involved the validity of an award in a condemnation proceeding. Mr. Justice Holmes, writing for the Court, said that not every judgment by which a man gets less than he ought to and in that sense is deprived of his property can come

to this Court. He added that when property is taken by eminent domain there must be something more than an ordinary honest mistake of law in the proceedings for compensation before a party can assert that the state has deprived him of his property unconstitutionally

The identical proposition has been before this Court in National Biscuit Company v. State of New York, No. 973, October term, 1961. Petition for Certiorari denied without written opinion June 8, 1962, 8 L. Ed. 2d 504.

The fact that some states allow compensation and some states deny compensation does not result in a denial of "equal protection of the laws". In State of Missouri v. Canada, 305 U.S. 337, 350; 59 S. Ct. 232 [1938], Mr. Chief Justice Hughes noted in writing the majority opinion that:

> "Manifestly, the obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdiction. It is there that the equality of legal right must be maintained."

Even if in one case a state court should refuse to allow compensation and in another seemingly identical case grant compensation, this would not amount to a

denial of "equal protection of the laws", for as Mr. Justice Brandeis said in Milwaukee Electric Ry. & Light Company v. State of Wisconsin, 252 U.S. 100, 106; 40 S. Ct. 306 [1919]:

> "The Fourteenth Amendment does not, in guaranteeing equal protection of the laws, assure uniformity of judicial decisions (Backus v. Fort Street Union Depot Company, 169 U.S. 557, 569, 18 Sup. Ct. 445, 42 L. Ed. 853), ..."

A reductio ad absurdum approach exposes most clearly the fallacy of Petitioners' argument for once a state court of last resort has ruled, that ruling would become not only the unalterable law of the state which rendered the decision, but of all other states as well. As Mr. Justice Cardozo so ably put it: "Hardly a rule of today but may be matched by its opposite of yesterday." (Nature of the Judicial Process [1957 Ed.], page 26).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Dated: Santa Fe, New Mexico, November 15, 1963.

Respectfully submitted,

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